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Nos. 02-241 and 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,

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v.

LEE BOLLINGER, JAMES J. DUDERSTADT, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF NEITHER PARTY

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF NEITHER PARTY

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* pursuant to Rule 37 with the written consent of the parties and intervenors.[1]

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes approximately 340 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's corporate members all are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. § 2000e *et seq.*, and other laws against workplace discrimination. Most also are federal government contractors subject to the affirmative action requirements of Executive Order 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (Oct. 13, 1967) and Executive Order 12086, 43 Fed. Reg. 46501 (Oct. 5, 1978). In addition, many EEAC member companies have voluntary programs to ensure that their workforces are diverse in race, gender, culture, and other characteristics. EEAC's member representatives typically are corporate officials charged with responsibility for implementing and complying with nondiscrimination and affirmative action mandates and diversity initiatives.

The Court of Appeals *en banc* reversed the district court's ruling that the use of race and ethnicity as a factor in admissions decisions by the University of Michigan Law School is both unconstitutional and violates Title VI of the

Civil Rights Act of 1964. *Grutter v. Bollinger*, 288 F.3d 732, 735 (6th Cir. 2002) (reversing 137 F. Supp.2d 821 (E.D. Mich. 2001)). According to the Court of Appeals, the Law School's admissions policy is lawful because efforts to maintain a racially and ethnically diverse student body serve a compelling state interest, *id.* at 739, and the policy is narrowly tailored to serve that interest. *Id.* at 744-47. Petitioners seek reversal of the Court of Appeals decision.

Although the questions now before the Court do not involve issues of employment law, EEAC's member companies nevertheless have a significant interest in the outcome, for two reasons. First, diversity in higher education is of significant value to employers in meeting their business-related diversity needs. Second, EEAC members stand to be affected by the decision in the event that language in the Court's opinion could be read to affect existing law applicable to private sector employers. EEAC's brief thus brings to the attention of the Court relevant matters not already brought to its attention by the parties.

STATEMENT OF THE CASE

Barbara Grutter, Petitioner in No. 02-241, applied for admission to the University of Michigan Law School in 1996. *Grutter v. Bollinger,* 137 F. Supp.2d 821, 823 (E.D. Mich. 2001). Her application was rejected in June 1997. *Id.* at 823-24. Grutter is Caucasian. *Id.* She sued the Law School, contending that it had discriminated against her because of her race, in violation of her right to equal protection of the laws under the Fourteenth Amendment to the Constitution and Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, which prohibits race discrimination by recipients of federal funds. *Id.* The Law School does use race as a factor in the admissions process. *Id.* at 836.

The district court concluded that the Law School's race-conscious admissions policy was unlawful, *id.* at 853, and the

Law School appealed. The Sixth Circuit heard the case initially *en banc*, and reversed. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002). The court concluded that (1) the goal of a diverse student body is a compelling state interest; and (2) the Law School's admissions policy is appropriately "narrowly tailored" to serve that interest.

The Sixth Circuit relied on this Court's unusually fragmented opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *Bakke* involved the admissions policy of the Medical School of the University of California at Davis (UCD), which maintained, at the time, a specified number of "special admissions slots" reserved for minorities. *Id.* at 275. The California Supreme Court had held that race can never be used as a factor in admissions and ordered that the white applicant be admitted to the medical school. *Id.* at 280-81.

This Court reversed the portion of the California court's ruling that race can *never* be a factor but affirmed the judgment that Bakke be admitted to the school. The Court did not, however, reach a consensus on a rationale for this outcome. A total of six Justices filed opinions in the *Bakke* case. None of these six opinions was supported by a majority of the Justices.

Justice Powell announced the Court's ruling, and wrote one of the opinions. Justice Powell concluded that race-based admissions can be constitutional if they serve a "compelling governmental interest," using a "strict scrutiny" test. *Id.* at 289-90. One such justification, he said, could be "the attainment of a diverse student body." *Id.* at 311-12. Even so, Justice Powell said, the UCD program was unconstitutional because it used an "explicit racial classification" and "totally excluded" non-minority applicants from a percentage of available seats solely because of their skin color, and UCD failed to show that such a stark distinction was "necessary to promote" the governmental interest

involved. *Id.* at 319-20. In an appendix to his opinion, Justice Powell attached and referred favorably to a description of the race-conscious Harvard College admissions program, which did not assign a specific percentage of admissions to minorities. Rather, the Harvard plan considered race a "plus" but did not make it decisive. *Id.* at 321-24.

No other Justice agreed completely with Justice Powell. In fact, the eight other Justices divided evenly on totally opposite approaches. Justice Stevens, then-Chief Justice Burger, then-Justice Rehnquist, and Justice Stewart, declined to reach the constitutional issue, holding simply that the UCD program violated Title VI because it discriminated against Bakke because of his race. *Id.* at 421. This created a five-Justice majority that Bakke should be admitted to UCD (albeit for different reasons), and that became the judgment of the Court. *Id.* at 271.

At the same time, Justice Brennan, joined by Justices White, Marshall, and Blackmun, concluded that race-based classifications could be used constitutionally for remedial purposes (*i.e.*, to remedy the effects of past discrimination), but that such classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 359 (citations omitted). Thus, the idea that race *sometimes* can be a legitimate factor *also* garnered a five-Justice majority. The Brennan opinion included a footnote saying that those four Justices also thought the Harvard plan was constitutional "at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." *Id.* at 326 n.1.

Justice Powell's opinion thus provided the "swing" vote that allowed the court to reach two specific conclusions in the case: (1) that Bakke was discriminated against based on his race and should be admitted to medical school; and (2) that

the California Supreme Court was wrong in holding that race could never be a factor in admissions decisions. None of the other eight Justices, however, said that they agreed with Justice Powell that student body diversity (as opposed to providing a remedy for the effects of past discrimination) was a sufficiently compelling governmental interest to justify the use of race.

The Sixth Circuit majority concluded that the *Bakke* decision established that student body diversity is a compelling government interest, 288 F.3d at 739, that can justify race-conscious decisionmaking if it is done in a way that is "narrowly tailored" to serve that interest. *Id.* at 744-47. The majority reasoned that the four Justices who agreed with Justice Powell's conclusion in *Bakke* that race could sometimes be a legitimate factor also agreed with him that the goal of student body diversity would justify using race. *Id.* at 741.

The majority relied on a previous decision of this Court that details how its decisions should be interpreted when there are many opinions and no clear holding. *Marks v. United States*, 430 U.S. 188, 193 (1977). In that case, the Court said, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (citation and internal quotation omitted). The Sixth Circuit majority reasoned that because the four Justices who agreed with Powell called for a less demanding test for race-conscious decisionmaking and Powell called for "strict scrutiny," Powell's was therefore the narrowest ground, making it the official holding of the Court. *Grutter*, 288 F.3d at 741.

Relying again on Justice Powell's *Bakke* opinion, the Sixth Circuit also concluded that the Michigan Law School admissions policy considering race as a factor is sufficiently

"narrowly tailored." The court below compared the Michigan policy to the Harvard program that Justice Powell mentioned approvingly in his *Bakke* opinion, and found that it "closely tracks the Harvard plan." *Id.* at 746. Considering race as a "plus," but maintaining a degree of competition, Judge Martin said, is significantly different from a quota system. *Id.*

The primary dissenting opinion in the case disputed Judge Martin's reading of the *Bakke* opinions. The dissent noted that the opinion in *Bakke* which the Sixth Circuit majority read as supporting Justice Powell, actually confined its approval of race-conscious decisionmaking to *remedial* programs designed to remedy past discrimination. *Id.* at 781. In the dissenters' view, no other member of the Court joined Justice Powell's conclusion that student body diversity alone was enough to justify a race-based program absent a history of discrimination. *Id.* at 782.

Grutter petitioned this Court for a writ of *certiorari* which was granted on December 2, 2002.

Jennifer Gratz and Patrick Hamacher, Petitioners in No. 02-516, are Caucasians who applied for admission to the undergraduate program of the University of Michigan, College of Literature, Science and the Arts. *Gratz v. Bollinger*, 122 F. Supp.2d 811, 815 (E.D. Mich. 2000). Like Grutter's, their applications were rejected, and they brought suit against the University under the Equal Protection Clause of the U.S. Constitution and Title VI. *Id.* The University also takes race into account in admissions, both by assigning applicants from under-represented minority groups an extra twenty points in an "index score" because of their race, and by using race as a "plus" for minority applicants who might not otherwise meet the University's threshold requirements. *Id.* at 827. In addition, during the period from 1995-1998, the University also reserved a number of seats in the entering class for under-represented minority applicants. *Id.* at 831.

The district court concluded that the University's current program was lawful under *Bakke*, because it uses race merely as a "plus" and still requires minority candidates to compete with other applicants. *Id.* at 831. Because the process used in 1995-1998 actually set aside seats for minority applicants, however, the district court found "no significant difference" between that process and the UCD quota system struck down by this Court in *Bakke*, and granted summary judgment to Petitioners regarding that system. *Id.* at 832.

Both sides appealed to the Sixth Circuit, which had not yet rendered a decision when the Petition was filed with this Court in *Grutter*. Petitioners Gratz and Hamacher sought from this Court a writ of *certiorari* before judgment, which was granted on December 2, 2002.

SUMMARY OF ARGUMENT

Progressive and conscientious U.S. employers have recognized that diversity in the workforce offers significant business advantages. Not only is the domestic consumer market becoming more diverse, but companies entering the global marketplace have new challenges as they seek to communicate with and market to different cultures. Internally, maintaining and cultivating a diverse workforce not only results in better business decisions, but leads to increased retention as employees of differing backgrounds feel included, respected and valued. As employers draw many of their employees and future leaders from our nation's colleges and universities, diversity among the student bodies of those institutions is an important component of these efforts.

U.S. employers have implemented numerous and various lawful programs designed to foster equal employment opportunity, comply with affirmative action requirements, and promote workforce diversity. While many of these programs are entirely race-neutral, this Court also has

sanctioned race-based decisionmaking in employment under certain circumstances. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987); *United Steelworkers v. Weber*, 443 U.S. 193 (1979). If the Court rules in this case that race-conscious decisionmaking for the purpose of achieving and maintaining student body diversity is unlawful, EEAC urges the Court to craft its opinion carefully so as not to invalidate existing legitimate activities by employers.

Moreover, if this Court rules that race-conscious decisionmaking is lawful for the purpose of achieving student body diversity, and language in the Court's opinion could be read to somehow affect workplace diversity, EEAC urges the court to provide guidance as to how its decision should be applied in the employment context.

ARGUMENT

I. DIVERSITY IN HIGHER EDUCATION IS ESSENTIAL TO EMPLOYERS IN MEETING THEIR BUSINESS-RELATED DIVERSITY NEEDS

American corporations today operate in an extraordinarily diverse environment. Internally, that diversity is reflected in employee populations that consist increasingly of individuals drawn from widely varied backgrounds, reflecting the growing diversity of the nation as a whole. Externally, that diversity is reflected in diverse consumers often spread across global marketplaces. To be successful, American companies must be able to operate effectively in such an environment. This will occur only if the corporate leaders of tomorrow are themselves diverse and are comfortable living and working with individuals having different backgrounds and experiences.

A significant number of these corporate leaders have been and will continue to be drawn from the graduating classes of our nation's public colleges and universities. Accordingly, America's corporations look to these institutions to provide candidates with the skills necessary to succeed in today's business environment. If these graduates are not diverse, and if their academic training has not been enriched through exposure to students of different backgrounds, then our corporations will be deprived of the leadership necessary to make them successful. For this reason diversity in higher education is essential to employers in meeting their business-related diversity needs.

The economic well-being of our country is linked, in significant measure, to the competitiveness of our nation's corporations. If a "business case" can be made that corporate diversity drives such competitiveness, then it follows that the federal government has a compelling governmental interest in ensuring a higher education system that will grow the talent that enhances the ability of U.S. companies to compete internationally.[2]

A. The Business Case for Diversity

The "business case for diversity" is strong and well-documented. Its basis is threefold. First, changing national demographics will require companies increasingly to fill key management positions with diverse candidates, both to communicate with potential customers and to manage effectively a workforce composed of employees of differing backgrounds. Second, U.S. companies increasingly are entering the global marketplace, creating a need for

[2] The *amicus curiae* takes no position on whether the admissions program of either the University of Michigan or the Law School is sufficiently "narrowly tailored" to serve that interest. Nor does the *amicus curiae* advocate the use of quotas or numerical set-asides in any diversity program.

employees at all levels who are skilled in dealing with the culture of each customer country. Third, companies have recognized that individuals from diverse backgrounds bring valuable differences in perspective and experience to all aspects of corporate decisionmaking, from operations to marketing to communications to human resources. For all of these reasons, cultivating a diverse workforce leads to a demonstrable increase in the "bottom line," as discussed below.

1. Demographic Changes Translate to Diversity in the Consumer Population

The face of the United States is changing. In 2001 alone, over 1 million people immigrated to the United States, compared to, for example, just over 270,000 in 1961.[3] Of the million new U.S. consumers, over 200,000 came from Mexico, over 70,000 from India, over 56,400 from the People's Republic of China, over 53,000 from the Philippines, and over 35,000 from Vietnam.[4] All told, U.S. immigrants in 2001 came from more than 48 countries around the world.[5] As of 1990, almost 29 million Americans over the age of 5 spoke a language other than English at home.[6]

[3] *Immigration to the United States: Fiscal Years 1820 to 2001*, 2001 Statistical Yearbook of the Immigration and Naturalization Service, Table 1, *available at* http://www.ins.usdoj.gov/graphics/aboutins/statistics/IMM01yrbk/IMM2001list.htm

[4] *Immigrants, Fiscal Year 2001*, 2001 Statistical Yearbook of the Immigration and Naturalization Service, 3, *available at* http://www.ins.gov/graphics/aboutins/statistics/IMM01yrbk/IMM2001.pdf

[5] *Immigration to the United States: Fiscal Years 1820 to 2001*, 2001 Statistical Yearbook of the Immigration and Naturalization Service, Table 2, *available at* http://www.ins.usdoj.gov/graphics/aboutins/statistics/IMM01yrbk/IMM2001list.htm

[6] 2000 Statistical Abstract of the United States, Table 51, p. 50, *available at* http://www.census.gov/prod/2001pubs/statab/sec01.pdf

Americans belong to a wide variety of organized religions,[7] and of course some belong to none at all. About a third live in rural areas; the other two-thirds live in or around cities.[8]

Although traditional racial classifications tell only part of the story, this too is changing. According to the Current Population Survey (Mar. 2002), household survey data maintained by the Bureau of Labor Statistics, in 1980, 80.4% of the U.S. population was White, 11.5% Black, 6.4% Hispanic, 1.5% Asian, and 0.6% Native American. By 2000, the White population had dropped to 71.8% and the Black, Hispanic and Asian populations had increased to 12.2%, 11.4% and 3.9%, respectively. Indeed, the Census Bureau predicts that by the year 2030, only 60.5% of the population will be White, and 13.1% will be Black, 18.9% Hispanic, and 6.7% Asian.

As a result, the many U.S. companies that market their products and services to consumers have recognized that few of their potential customers meet some archetypal model of the "typical" American, if indeed any ever did. Rather, along with targeted marketing to particular age groups and interest sectors, these companies are aware of the need to communicate effectively to various cultural groups with differing customs and preferences for various goods and services, from automobiles to laundry soap and beyond. Employees with direct experience in these markets, whether through personal participation or other contacts, provide invaluable insight into the best ways to present the company's product.

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[7] *Id.* at Table 74, p. 61, *available at* http://www.census.gov/prod/2001pubs/statab/sec01.pdf

[8] *Id.* at Table 31, p. 31, *available at* http://www.census.gov/prod/2001pubs/statab/sec01.pdf

2. Entering the Global Marketplace Creates a Need for Diversity Skills

In addition, more and more U.S.-based companies are competing globally for customers worldwide. According to statistics compiled by the World Trade Organization, the United States was the leading world exporter of merchandise in 2001, with nearly a 12% market share amounting to over $730 billion.[9] Nearly $200 billion dollars of U.S. merchandise were sold in Asia, $175 billion in Western Europe, $159 billion in Latin America, and almost $20 billion in the Middle East.[10]

The United States also led other countries in world trade in commercial services, commanding greater than a 18% share for over $263 billion.[11] Its closest competitor, the United Kingdom, had only a 7.4% share in comparison.[12]

Expanding into the global marketplace necessitates developing an ability to communicate in every chosen market. Each country has cultural norms and customs that differ from those in the United States, some more dramatically than others. Besides the need to advertise—and do so accurately—in local languages and in common usage, each company must be able to gauge the demand for each

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[9] World Trade Organization, International Trade Statistics 2002,Table I.5, *Leading exporters in world merchandise trade, 2001, available at* http://www.wto.org/english/res_e/statis_e/its2002_e/section1_e/i05.xls

[10] World Trade Organization, International Trade Statistics 2002,Table III.17, *Merchandise trade of the United States by region and economy, 2001, available at* http://www.wto.org/english/res_e/statis_e/its2002_e/section3_e/iii17.xls

[11] World Trade Organization, International Trade Statistics 2002, Table I.7, *Leading exporters in world trade in commercial services, 2001, available at* http://www.wto.org/english/res_e/statis_e/its2002_e/section1_e/i07.xls

[12] *Id.*

product, and identify ways to increase that demand. Employees who have experience with other cultures supply a key component of a globally competitive company's ability to meet its needs in this area.

3. Workforce Diversity Improves Internal Performance

Equally important is the recognition that cultural diversity exists within the workforce itself. Like the general population demographics, the distribution among the working population by race and ethnicity is changing as well. While 77.7% of the civilian work force in 1990 was White, 10.8% Black, 8.5% Hispanic and 3.0% Asian or other non-Hispanic, by 2000 the minority populations had grown to 11.5%, 10.9% and 4.5% respectively, while the percentage of Whites in the workforce had dropped to 73.1.% By 2010, the U.S. Department of Labor Bureau of Labor Statistics predicts that only 69.2% of the U.S. workforce will be White, 12% Black, 13.3% Hispanic, and 5.5% Asian and other non-Hispanic.[13]

Accordingly, there is increasing diversity among the pool of applicants available for every job, resulting necessarily in each company's own workforce becoming more diverse. Accordingly, being able to work with and manage individuals of diverse backgrounds has become an increasingly important professional skill in U.S. businesses, so much so that some companies consider this skill in evaluating managerial performance. As discussed in more detail below, moreover, many forward-thinking companies have undertaken affirmative efforts not only to recruit a diverse workforce as well as to adopt programs and policies designed to make individuals of varying cultural backgrounds feel welcomed and valued. Indeed, companies that fail to effectively manage

[13] United States Department of Labor, Bureau of Labor Statistics, Office of Occupational Statistics and Employment Projections, Table 9, *available at* http://stats.bls.gov/emp/emplab2000-09.pdf

and nurture diversity are likely to face attrition, as employees who feel that they do not "fit in" go elsewhere, resulting in a waste of recruiting and training dollars and a loss of good employees.

Moreover, company leadership itself is becoming more diverse. In 2001, of nearly 20 million people employed in executive, administrative and managerial occupations, 8.3% were Black and 5.1% were of Hispanic origin.[14] Companies that expect to compete successfully to attract talented leaders must recognize and embrace this fact.

Indeed, companies that have made efforts to recruit and cultivate individuals of diverse backgrounds have reaped significant rewards. Where there is diversity of background and experience, there is variety in perspective and opinion, leading to more informed judgments.

4. Workforce Diversity Improves the Bottom Line

Companies that strive to embrace diversity in the workforce have seen a measurable impact on the "bottom line." Fortune Magazine found that the businesses that made its 1999 list of "America's 50 Best Companies for Asians, Blacks and Hispanics" outperformed the S&P 500 over the prior three and five years.[15] Similarly, companies that have received the U.S. Department of Labor's "Exemplary Voluntary Efforts" Award[16] also have seen improved stock

[14] United States Department of Labor, Bureau of Labor Statistics, Annual Averages—Household Data, Table 11 (2001), *available at* http://stats.bls.gov/cps/cpsaat11.pdf

[15] Geoffrey Colvin, *The 50 Best Companies for Asians, Blacks, & Hispanics: Companies that pursue diversity outperform the S&P 500. Coincidence?* (Fortune Magazine, July 19, 1999).

[16] According to the Department of Labor, its Exemplary Voluntary Efforts (EVE) AWARD "honors federal contractors that have

performance, resulting in a conclusion that "announcements of quality affirmative action programs are associated with significant and positive excess returns that represent the capitalization of positive information concerning improved business prospects."[17] Indeed, the federal Equal Employment Opportunity Commission (EEOC) also is on record that "[i]nclusive hiring and promotion practices bring into the organization segments of the workforce that may well provide competitive advantage in the increasingly global economy. *Best Practices of Private Sector Employers* (Equal Employment Opportunity Comm'n, 1997), at 6-7.

Companies agree. According to a 2001 survey of human resources professionals from Fortune 100 Companies and companies listed on Fortune's "Top 100 Companies to Work For" list, co-sponsored by the Society for Human Resource Management and Fortune Magazine, 91% of the respondents said that diversity initiatives "help the organization keep a competitive advantage."[18] A 1998 survey conducted by the American Management Association of its member companies revealed "strong evidence" that "a mixture of genders, ethnic backgrounds, and ages in senior management teams consistently correlates to superior corporate performance."[19] In 1995, the federal Glass Ceiling Commission reported that corporate executives they had surveyed confirmed "the

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demonstrated through programs or activities, exemplary and innovative efforts to increase the employment opportunities of employees, including minorities, women, individuals with disabilities, and veterans." *See* http://www.dol.gov/esa/media/reports/ofccp/eveint.htm

[17] Peter Wright, Stephen P. Ferris, Janine S. Hiller, Mark Kroll, *Competitiveness through management of diversity: effects on stock price valuation* (Academy of Mgmt. Journal, Feb. 1, 1995).

[18] *Impact of Diversity Initiatives on the Bottom Line* (Society for Human Res. Mgmt., 2001), at 16.

[19] Senior Management Teams: Profiles and Performance (American Management Ass'n, 1998), at 1.

bottom-line value and economic imperative of including minorities and women in senior corporate management."[20]

Accordingly, there is a strong "business case" that having —and keeping—individuals of diverse cultural backgrounds in a company's workforce provides significant advantages to the company.

B. Student Body Diversity in Higher Education Contributes Significantly to Companies' Efforts To Meet Their Need for Workforce Diversity

Many jobs require a college degree, although some will allow for equivalent experience. According to data for the year 2000 compiled by the Equal Employment Opportunity Commission (EEOC) from statistical reports from nearly 40,000 private sector employers[21], seven million of the 53 million employees covered by the reports, or about 13.2%, were in jobs that required a college degree or equivalent experience."[22] In the EEOC's own words, these jobs include "accountants and auditors, airplane pilots and navigators,

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[20] *Good For Business: Making Full Use of the Nation's Human Capital* (Federal Glass Ceiling Comm'n, Mar. 1995), at 7.

[21] Job Patterns For Minorities And Women In Private Industry (EEO-1), *Introductory Note* (Equal Employment Opportunity Comm'n, 2002), *available at* http://www.eeoc.gov/stats/jobpat/jobpat.html. The Equal Employment Opportunity Employer Information Report (EEO-1) is required annually by the Equal Employment Opportunity Commission from employers with 100 or more employees. 29 C.F.R. § 1602.7.

[22] Occupational Employment in Private Industry by Race/Ethnic Group/Sex, and by Industry, United States, 2000 (Equal Employment Opportunity Comm'n, 2002), *available at* http://www.eeoc.gov/stats/jobpat/2000/national.html. The "professionals" category is defined in the EEOC's instructions for the report as "[o]ccupations requiring either college graduation or experience of such kind and amount as to provide a comparable background." *See* http://www.eeoc.gov/stats/jobpat/e1instruct.html

architects, artists, chemists, designers, dietitians, editors, engineers, lawyers, librarians, mathematicians, natural scientists, registered professional nurses, personnel and labor relations specialists, physical scientists, physicians, social scientists, teachers, surveyors [and the like]."[23] Another reporting category covers "[o]fficials and managers," defined as "[o]ccupations requiring administrative and managerial personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases of a firm's operations," and including "officials, executives, middle management," and others.[24] Companies reported 4.7 million workers in the "officials and managers" category in 2000, at least some of whom would have college degrees. These numbers, of course, account for only about a third of the civilian workforce, which numbered nearly 141 million in 2000,[25] since only employers with 100 or more employees are required to file the annual EEO-1 report.

Accordingly, EEAC's members and other companies necessarily recruit workers for positions requiring undergraduate or graduate degrees from colleges and universities throughout the country. Along with obtaining candidates who possess specific qualifications required for a particular job, such as a degree in mechanical engineering, companies benefit, for the reasons identified above, from having candidates who matriculate from an institute with a culturally diverse student body.

First, such an institution produces graduates of varied cultural backgrounds who themselves possess the diversity of

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[23] *Id.*

[24] *Id.*

[25] United States Department of Labor, Bureau of Labor Statistics, Office of Occupational Statistics and Employment Projections, Table 9 (2000), *available at* http://stats.bls.gov/emp/emplab2000-09.pdf

perspective so valuable to business. Second, students who have attended such an institution necessarily have obtained experience in relating to people from other backgrounds. This experience translates well to a diverse workforce and makes the ability to build such relationships one less new skill the employee must learn on the job.

Accordingly, a culturally diverse student body at an institution of higher learning directly contributes to diversity in the workforce at each American business that recruits from that institution. Given the strong business case for diversity in the workforce, student body diversity within our colleges and universities, institutions that will provide the corporate leaders of tomorrow, is a compelling state interest.

II. IF THIS COURT CONCLUDES THAT RACE-CONSCIOUS ADMISSIONS ARE UNLAWFUL OR UNCONSTITUTIONAL, THE COURT SHOULD STATE ITS HOLDING SO AS NOT TO INVALIDATE THE AFFIRMATIVE ACTION AND DIVERSITY PROGRAMS LAWFULLY IN USE BY PRIVATE SECTOR EMPLOYERS

A. Conscientious Companies Maintain Various Legitimate Programs To Promote Equal Employment Opportunities, Practice Affirmative Action, and Promote and Manage Workforce Diversity

Public discourse about "affirmative action" and "diversity initiatives" tends to be conducted in language that is imprecise and unnecessarily provocative. Frequently, these terms are used repeatedly as if they were synonymous with "race-based preferential treatment." They are not, and such casual usage only spreads confusion and controversy. U.S. employers practice, on a daily basis, affirmative action and diversity initiatives that do not even arguably involve any

race-based preference. Accordingly, to the extent that the Court's decision could be read in any way to affect private sector employment, it is vitally important that this Court, in framing its decision in this case, use clear language to describe the practice or practices it seeks to address.

For a variety of reasons, U.S. employers, particularly larger ones, have instituted programs designed to ensure that individuals of diverse backgrounds receive equal opportunities, treatment and equal respect in the workplace. One fundamental reason, albeit not the only one, is the recognition of an employer's statutory obligation under Title VII of the Civil Rights Act of 1964 (Title VII) not to discriminate on the basis of race, color, national origin, gender or religion in any aspect of the employment relationship.

In addition, businesses that contract with the federal government are subject to affirmative action obligations under Executive Order 11246, which requires them to agree that they:

> will not discriminate against any employee or applicant because of race, color, religion, sex, or national origin, . . . [and] will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.

Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965) (quoting subpart B, § 202(1)). *See also* 41 C.F.R. § 60-1.4(a)(1).[26]

[26] Covered federal contractors also have a responsibility to take affirmative action to hire and promote individuals with disabilities, 29 U.S.C. § 793 and 41 C.F.R. § 60-741.5, and certain veterans, 38 U.S.C. § 4212 and 41 C.F.R. § 60-250.5.

Affirmative action typically involves reviewing employment practices and workplace conditions to see whether any of them may pose an obstacle to equal opportunity for minorities and women. *See* 41 C.F.R. § 60-2.17(b). When such an obstacle is found, the contractor is expected to make good faith efforts to remove it. 41 C.F.R. § 60-2.17(c).

Broadening the company recruiting efforts to reach out to a more diverse talent pool has been the cornerstone of successful affirmative action efforts for many years. 41 C.F.R. § 60-2.10(a)(1) and (3). Accordingly, federal contractors frequently recruit from such organizations as the National Society of Black Engineers,[27] the Society of Hispanic Professional Engineers,[28] the American Indian Science and Engineer Society,[29] the National Association of Black Accountants, [30] local affiliates of the National Urban League,[31] the NAACP,[32] and many others, as well as historically black colleges and universities.

Affirmative action does not stop at the hiring stage, however. The implementing regulations address the total employment process, referring not only to the initial stages of recruitment and selection but also to compensation, promotions, development and advancement, to ensure that the company's nondiscrimination and affirmative action obligations are effectively carried out at all levels of the organization and across all aspects of the employer-employee relationship. 41 C.F.R. §§ 60-2.17(b), 2.17(d)(1). As a

[27] www.nsbe.org

[28] www.shpe.org

[29] www.aises.org

[30] www.nabainc.org

[31] www.nul.org

[32] www.naacp.org

result, companies monitor by demographic characteristics the results not only of their recruitment and hiring decisions, but also of their promotion or advancement decisions, how they pay their employees, the distribution of developmental assignments, the impact of the employer's performance management process, and adverse personnel actions such as discipline and termination. *Id.*

These common forms of affirmative action programs usually need not—and typically *do* not—involve any use of race-based preferences or quotas. Although federal affirmative action requirements mandate the establishment of placement goals if the expected minority or female representation falls short in a particular job group or groups, 41 C.F.R. § 60-2.15, they expressly forbid the use of quotas. 41 C.F.R. § 60-2.16(e). As a practical matter, having made affirmative efforts to bring plenty of qualified minorities and women into the pools from which they hire and promote, employers that practice these non-preferential forms of affirmative action generally are able to meet their goals without making selections based on race, and without lowering their standards.

In addition to complying with affirmative action requirements, progressive companies that recognize the business advantages of recruiting and retaining a diverse workforce frequently expand the breadth and depth of their efforts into full-fledged "diversity initiatives." In general, diversity initiatives often extend well beyond legally mandated compliance efforts and seek to develop and implement business practices geared towards promoting an inclusive work environment, with the goal of attracting and keeping qualified employees of various backgrounds and experiences. *See generally* Gladys Gossett Hankins, Ph.D., *Diversity Blues: How To Shake 'Em* (Telvic Press, Inc., 2000), at 9-11. Diversity initiatives address a much broader range of demographic characteristics than are covered by federal affirmative action regulations. For example, they may

extend to differences in age, cultural background, family responsibilities, sexual orientation, and religion.[33]

Although diversity programs operate within the law, they are not otherwise compelled or regulated. Not surprisingly, diversity initiatives tend to vary widely from company to company. Typically, however, they feature several components. At a minimum, the company will provide diversity education to members of management and in some cases non-management employees, to enhance their ability to value differences, afford dignity and respect, and practice inclusiveness toward individuals from diverse backgrounds.[34] Companies also may recognize and support "affinity groups" that provide forums for employees to discuss issues of common interest and address common problems through a combination of mentoring, self-help, and mutual support.[35] Some companies also include in their diversity initiatives work-life balance programs such as flexible work arrangements, onsite day care, elder care assistance, and the like.[36] The federal Equal Employment Opportunity Commission has commended many such initiatives as "best practices." *Best Practices of Private Sector Employers* (Equal Employment Opportunity Comm'n, 1997). In short, the terms "affirmative action" and "diversity initiative," used properly, include many worthwhile programs that have nothing whatever to do with selecting or preferring employees on the basis of race.

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[33] *Diversity Today: Corporate Recruiting Creates Inclusive Workplaces* (Society for Human Res. Mgmt., Sept. 30, 2002), at S2.

[34] Helen Lippman, *Variety is the spice of a great workforce*, (Business and Health, May 1, 2000), at 4, *available at* 2000 WL 33410370.

[35] Raymond A. Friedman and Erika Bogar, *Trends in Corporate Policy Development for Employee Network Groups*, Working Paper #99-18, Owen Graduate Sch. of Mgmt., Vanderbilt Univ. (1999), at 4.

[36] *Diversity Today: Corporate Recruiting Creates Inclusive Workplaces* (Society for Human Res. Mgmt., Sept. 30, 2002), at S2.

B. This Court's Decision Should Not Disturb Legitimate Equal Employment Opportunity Efforts, Affirmative Action Programs, and Diversity Initiatives

The programs described above are unquestionably lawful, and should remain so. Indeed, when Congress passed the Civil Rights Act of 1991, making a number of amendments to Title VII, it provided specifically that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." Pub. L. 102-166 (1991), § 116, codified as 42 U.S.C. § 1981 note (internal quotation marks omitted). The Equal Employment Opportunity Commission also confirmed this point in affirmative action guidelines issued many years ago. *See* 29 C.F.R. pt. 1608.

Moreover, this Court more than twenty years ago afforded employers an area of discretion within which they may take race into account lawfully, without running afoul of the statutory bans on discrimination. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987); *United Steelworkers v. Weber*, 443 U.S. 193 (1979). Under *Johnson* and *Weber*, an employer *may* take race into account pursuant to an affirmative action plan in order to "eliminate a manifest racial imbalance" in traditionally segregated job categories, provided that it is a "temporary measure" that does not "unnecessarily trammel the interests of the white employees." *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 628-30 (internal quotation marks omitted).

For the sake of organizations throughout the United States that regularly practice the noncontroversial forms of affirmative action and diversity described above, it is important that this Court not paint with too broad a brush in addressing the particular practice involved in this case.

III. IF THIS COURT CONCLUDES THAT RACE-CONSCIOUS DECISIONMAKING IS PERMISSIBLE FOR THE PURPOSE OF MAINTAINING STUDENT BODY DIVERSITY, THE COURT SHOULD DESCRIBE AS CLEARLY AS POSSIBLE THE CIRCUMSTANCES, IF ANY, IN WHICH THE SAME REASONING MAY APPLY TO THE USE OF RACE IN EMPLOYMENT DECISIONS

This Court and others have commented repeatedly on the dilemma that employers face when they attempt to take race into account in lawful ways to assure minorities equal employment opportunity, while not unduly interfering with the rights or opportunities of nonminorities. Judge Wisdom described this dilemma in his dissenting opinion in *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 230 (5th Cir. 1977), when that case was before the Fifth Circuit:

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay (citation omitted).

When the *Weber* case reached this Court, Justice Blackmun commented similarly, in his concurring opinion, on the predicament that employers face when Title VII is read literally:

> If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary

> preferences adopted to mitigate the effects of prior discrimination against blacks.

443 U.S. at 210 (Blackmun, J., concurring). *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring) (observing that under an unduly narrow approach, employers are "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken") (emphasis in original).

Reasoning that Congress could not have intended Title VII to place employers in such an untenable position, this Court in *Johnson* eschewed a literal reading of Title VII and construed it instead to afford employers an area of discretion within which they may take race and/or gender into account lawfully. Yet, as Justice O'Connor has pointed out, even such a flexible approach is unsatisfactory if it "gives insufficient guidance to courts and litigants." 480 U.S. at 648 (O'Connor, J., concurring). Thus, Justice O'Connor was critical of what she described as "an expansive and ill-defined approach to voluntary affirmative action." *Id.*

If there are non-remedial justifications for using race as a factor in making admissions decisions to ensure student body diversity, and this Court intends to extend those justifications to employment decisions—such as a desire to maintain a diverse workforce—employers need to know what standards should apply. The *amicus* strongly urges, therefore, that if the Court concludes that race ever may be used for a non-remedial purpose in employment, the Court spell out, as clearly as possible, the principles governing that determination, so that employers will have a set of standards to follow in designing and implementing their affirmative action and diversity programs.

For example, this Court has made clear through past decisions that, to pass muster under Title VII (and the

Constitution, where applicable), an employer's use of race as a factor in an employment decision made pursuant to an affirmative action plan not only must serve a compelling interest, but also must be "narrowly tailored" so that it does not "unnecessarily trammel the interests" of those not benefiting directly from the plan." *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 630 (internal quotation marks omitted). In the context of race-conscious decisions designed to remedy a manifest imbalance, this requirement may be met by evidence showing that an affirmative action plan does not require the discharge of nonminority employees nor create an absolute bar to their advancement, and that the plan is a "temporary measure, not designed to maintain racial balance." *Johnson* at 630 (citing *Weber*). If this Court now concludes that Title VII permits uses of race for the sake of promoting workforce diversity, then we urge that it address whether the same or a similar set of requirements of "narrow tailoring" also apply in that context.

It is particularly important to know whether programs using race for the sake of workforce diversity must be temporary in duration. The conclusion that remedial uses of race are impermissible for the purpose of *maintaining* racial balance appears to rest on the premise that, once balance has been achieved, remedial action no longer is needed. But it is debatable whether that premise is sound when applied to most diversity programs. To the extent that a private business determines that a diverse workforce is essential to its ability to compete effectively or to serve a diverse customer population, its need for diversity also is likely to be continuing in nature. For this reason, it becomes essential to know whether an employer's need for workforce diversity *ever* can justify programs in which race or gender is used on an *ongoing* or *recurrent* basis in making employment decisions. Again, guidance from the Court on this issue would be extremely helpful.

CONCLUSION

Progressive employers have a business need for a qualified diverse workforce, which can be supplied, at least in part, by institutions of higher education that have a diverse student body. These employers, through lawful affirmative action programs and diversity initiatives, have made considerable progress toward recruiting and retaining employees of diverse backgrounds. Moreover, this Court's decisions in *Weber* and *Johnson* provide reasonably clear guidelines that have allowed employers voluntarily to give limited consideration to race and gender pursuant to properly designed affirmative action plans aimed at remedying manifest imbalances in their workforces, without running an undue risk of liability under Title VII. However the Court answers the questions presented in this case, in the event any part of the Court's decision is applicable to private sector employment, then employers, lower courts, and employment law enforcement agencies will need additional guidance on the issues addressed in this *amicus curiae* brief. We urge the Court to keep this need for guidance and direction in mind in framing its opinion.

Respectfully submitted,

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